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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 426

KONINKLIJKE LUCHTVAART MAATSCHAPPIJ N.V. KLM ROYAL DUTCH AIRLINES HOLLAND and SOCIETE ANONYME BELGE D'EXPLOITATION DE LA NAVIGATION AERIENNE,

Petitioners,

—against—

GERTRUDE OWEN TULLER, individually and as Executrix under the Will of William Gordon Tuller, deceased, KATHERYN L. TULLER, a minor by GERTRUDE OWEN TULLER, her mother and next friend, and JEAN E. TULLER, a minor by GERTRUDE OWEN TULLER, her mother and next friend,

Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents' brief contains flagrant distortions of the evidence. A few illustrations will demonstrate how serious they are.

Respondents, refusing to accept petitioners' statement of the case, taken almost verbatim from the Court of Appeals opinion (App. 32-34, 37), state that the plane took off from Shannon Airport at 2:38 a.m. in "clear, calm weather" (Brief 3). They cite page 33a of the Joint Appendix as authority for

that statement—yet the quoted words do not appear on page 33a. That page consisted of excerpts from a stipulation of facts read into evidence by respondents' counsel. Actually, all witnesses on the subject testified that when the plane passed over the end of the airport boundary it was a pitch black night (JA 121a, 258a).

On the same page 3 of their brief, respondents refer to the fact that "the aircraft carried a portable emergency radio which, upon turning an attached crank, would generate its own power and automatically transmit distress signals * * *." However, they fail to state that this equipment was in a cloakroom near the main cabin door of the plane and that Oudshoorn, their own witness, testified that when he tried to go back into the cabin in an attempt to rescue passengers, the mixture of gasoline and water in that area of the plane was already over his head (JA 331a).

In allegedly describing the accident, respondents make the following statement (Brief 4): "32 to 42 seconds after the aircraft became airborne it made an involuntary landing on the Estuary of the River Shannon (JA 33a), coming to rest on the mud and in a few feet of water. Impact with the water was relatively mild and the plane did not sink. The aircraft did not break apart (JA 123a)." Yet, when we consult their first reference, to wit, JA 33a, we find that the stipulation of facts, entered into in the pretrial proceeding and read into evidence by the same attorneys who wrote respondents' brief, states: "The plane *crashed* approximately 32 to 42 seconds after it became airborne". (Emphasis supplied.) Furthermore, the JA 123a reference does not in any way support the other statements made above that the air-

craft came to rest in a few feet of water and did not break apart. As a matter of fact, Cornelius Bruynesteyn, chief of the Constellation maintenance department of KLM, who went out to the wreckage at 5:00 o'clock in the afternoon of the day of the accident to assist in the removal of bodies, testified to the terrific damage sustained by the plane in the crash. He found that numbers 3 and 4 engines were ripped off the right wing; that the outer wing panel was broken; that number 3 dinghy was completely ripped off the airplane; that serious damage was wrought in other parts of the airplane, including the right wing and the fuselage; and that fuel tanks were broken (JA 448a, 453a). Parfitt, the first officer, also described the gaping holes in the floor and in the roof in the center of the fuselage (JA 256a).

We could point out innumerable similar distortions throughout respondents' brief but space will not permit it and we do not intend to be drawn into a futile discussion of the weight of the evidence. It is not petitioners' intention to reply seriatim to each of respondents' points since most of them have already been covered in the petition. However, a few require emphatic refutation.

If, on page 8 of their brief, respondents intend to convey the impression that petitioners acquiesced in the trial court's interpretation of wilful misconduct, that is entirely incorrect. In motions to dismiss and for directed verdicts at the close of plaintiffs' case and at the close of the entire case, petitioners specified the elements of wilful misconduct which were required to be proven to establish a prima facie case and pointed out that respondents had failed to supply such proof (JA 416a, 571a).

As to Equating Wilful Misconduct With Negligence

At page 9 of their brief, respondents attempt to rewrite the opinion of the Court of Appeals so as to substitute "the acts in question" for the court's use of "the negligence in question" in its holding with respect to proximate cause. However, this is not what the Court of Appeals said (App. 43), and in dealing with rights asserted in reliance upon federal treaty obligations it must be assumed that the Court of Appeals meant what it said. If the Court of Appeals did not intend to equate "negligence" with "wilful misconduct", it is surprising that it did not correct this obvious error when it corrected its original opinion and ordered that the opinion as reprinted be substituted for the first print (R. 697). Article 25 of the Warsaw Convention clearly provides that the carrier shall not be entitled to exclude or limit its liability "if the damage is caused by his wilful misconduct." Here, there has been no holding by the Court of Appeals that the damage was caused by petitioners' wilful misconduct. On the contrary, that court has held only that there was evidence from which a jury could reasonably find that "the negligence in question contributed proximately to Tuller's death" (App. 43). The obvious error of equating "wilful misconduct" with "the negligence in question" cannot be overcome by the simple device of rewriting the court's opinion or imputing to an experienced panel of federal judges, one of whom is a retired justice of this Court, carelessness in expression and draftsmanship.

As to the Question of Life Vests

On page 19 of their brief, respondents state:

> "* * * Although the testimony of Ellis was positive on this subject, the appellants did not attempt to prove by any member of the crew that any instruction on the subject [of life vests] was given to the passengers."

Respondents' counsel are perfectly aware of the fact that when instructions are given to passengers with respect to life vests, such instructions are always given by cabin attendants. All three cabin attendants on board the KLM plane, to wit, the purser, the steward, and the stewardess, died in the crash (JA 501a). The proof of their deaths was vigorously objected to by plaintiffs (JA 498a-501a). Plaintiffs tried to convey to the jury the same erroneous impression that respondents have attempted to convey to this Court (Brief 11, 19), to wit, that *all* of the members of the KLM crew escaped and that, absent testimony to the contrary, petitioners conceded that nothing was said to the passengers about life vests.

Respondents, in their brief, still contend that the Irish regulation was violated, even though the Court of Appeals apparently did not agree with them. The wording of the regulation is much more intelligible when read in full (App. 30), rather than when read with important portions omitted as on page 19 of respondents' brief. It is hard to understand how the Court of Appeals could find the Irish regulation inapplicable (App. 37-38) and still find that the repeated statements of plaintiffs' counsel to the jury that it had been violated "was a fair subject of comment" (App. 43).

As to Oudshoorn's Statement

It is interesting to note that respondents make no attempt to justify the introduction of this statement into evidence upon the grounds stated by the Court of Appeals, but only upon arguments (Brief 27-31) advanced by them under similar headings in their brief in the Court of Appeals. The Court of Appeals apparently rejected such arguments as unsound because (a) Oudshoorn had not been employed by or connected with petitioners in any way for at least eight months prior to the time plaintiffs took his deposition; (b) as plaintiffs' witness they were not permitted to impeach or discredit him; (c) the various rules of law referred to by respondents were not applicable to the facts in this case.

As the Court of Appeals ruled, the statement was not a part of the res gestae. Furthermore, the argument that it was a memorandum made in the regular course of business does not make sense. It was not a memorandum of KLM. If anything, it was one of the records of the Irish investigation committee. The cases cited by respondents to support their argument that the statement was admissible by "imputation" also fail upon analysis. In one case so cited, a statement had been made several hours after the accident by a *party-defendant* to the action, and in the other case the statement was made almost immediately after the accident, the declarant was dead at the time it was received into evidence, and it was against his pecuniary interest when made. Respondents' argument that the statement was made in the course of an

agency is well-answered by Richardson on Evidence (8th edition), Section 329, as follows:

> "* * * But a declaration made by an agent without authority (Taylor v. Commercial Bank, 174 N.Y. 181, 66 N.E. 726, 62 L.R.A. 783), or while not acting in the discharge of his duties as agent (State Bank v. Brocton Fruit Juice Co., 208 N.Y. 492, 102 N.E. 591), or after the agency has terminated is not an admission receivable against the principal. See, also Turner v. Northwestern Mut. Life Ins. Co., 232 N.Y. 171, 133 N.E. 435."

As to the Chicago Convention

Respondents' statement (Brief 20), that petitioners make reference "now for the first time to some immaterial passages in the Chicago Convention," is false. The applicability of the Chicago Convention, and, in particular, Article 11 thereof,[1] was argued extensively and briefed in the district court.[2] Moreover, in their reply brief in the Court of Appeals, petitioners expressly cited Article 11 and argued that the Irish regulation made applicable pursuant to the Chicago Convention had not been violated.[3] The issue

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[1] 61 Stat. 1180, 1183 (App. 28).

[2] The morning session of the trial on November 23, 1959, was devoted exclusively to arguments relating to the KLM-Sabena contract and the applicability of the Irish Air Navigation (Operations) Order pursuant to the provisions of the Chicago Convention.

[3] Appellants' reply brief filed in the Court of Appeals, pp. 9-10:

> "* * * Pursuant to Article 11 of the Chicago Convention (61 Stat. 1180, 1183), an international treaty and therefore part of the supreme law of the land, the Irish laws and regulations relating to the operation of aircraft engaged in international air navigation while within Irish territory were

raised below and the question presented here is not, as respondents would have it appear, a synthetic treaty question, but a real question as to whether a court of a ratifying state can escape the absolute command of Article 11 of the Chicago Convention. Here, the Court of Appeals not only disregarded the mandate of the treaty, but also made a mockery of it by declaring that permissible conduct, performed on Irish territory, in accordance with a national regulation of Ireland and made applicable pursuant to the treaty, constituted "wilful misconduct".

As to the Exceptions to the Charge

Respondents' statement (Brief 34-35) that petitioners' counsel agreed to a portion of the charge wherein the court used the clause "or either of them" in discussing wilful misconduct, is deceptive. The record shows that the case was submitted to the jury on the afternoon of December 2, 1959, and that it was just prior to such submission (the proper time to except [object] according to Rule 51 F.R.C.P.) that defendants' counsel was denied the opportunity to except to the charge. The incident referred to in respondents' brief took place at approximately 3:00 o'clock the following afternoon, to wit, December 3, 1959. At that time defendants' counsel did not agree to the charge or the reinstruction but merely agreed

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the laws and regulations to be applied to the flight involved in this litigation, and the trial court so ruled (JA 436). However, the Irish regulation relied on by appellees did not require notification to passengers of the location and use of life vests in the case of a land plane until 'reaching 30 minutes' flying distance from the nearest shore' (JA 439). Hence, this regulation, read into evidence by plaintiffs, was never violated. * * *"

that the portion of the charge reread to the jury was in fact what the jury had requested to hear (JA 655a-656a). In view of the trial court's explicit refusal to hear defendants' exceptions to the charge before the jury first retired to deliberate (JA 648a), defendants' counsel had no alternative but to obey the court's ruling of the previous day.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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Dated October 24, 1961

JAMES B. MCQUILLAN
Of Counsel